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IN THE

United States Supreme Court

OCTOBER TERM, 1974

NO. 74-768

CLARENCE BROWN,

Petitioner,

v.

GENERAL SERVICES ADMINISTRATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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GENERAL SERVICES ADMINISTRATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Clarence Brown, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on November 21, 1974.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is set out in the Appendix hereto at pp. 2a-18a. The opinion of the District Court, which is not reported, is set out in the Appendix hereto at p. 1a.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did section 717 of Title VII of the 1964 Civil Rights Act repeal, *pro tanto*, the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act?

2. Are the exhaustion requirements for a civil action to remedy employment discrimination, maintained under the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act, different and more stringent than those established by Congress for an action under section 717?

Statutory Provisions Involved

Section 717(a) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(a), provides:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds) in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress

> shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e-16(c), provides:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Section 1981, 42 U.S.C., provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws proceedings for the security of persons and property as is enjoyed by white citizens and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1361, 28 U.S.C., provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Section 1346, 28 U.S.C., provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Statement of the Case

Petitioner is a black employee of the General Services Administration. Petitioner, who is presently a GS-7, has not been promoted for 8 years.

On July 15, 1971, petitioner filed with the General Services Administration Equal Employment Office an administrative complaint alleging that he had been denied a promotion on the basis of race. The agency investigation revealed that petitioner had been repeatedly passed over for promotions in favor of white employees. The uncontested statistics revealed that a disproportionately low

number of black employees were promoted above the GS-7 level within the General Services Administration. On March 23, 1973, twenty months after petitioner filed his administrative complaint, the General Services Administration issued its final agency decision concluding that it had not discriminated on the basis of race.

Petitioner was notified of the agency decision on March 26, 1973. The letter of notification advised petitioner that he could commence a civil action in the United States District Court, or file an appeal to the Board of Appeals and Review of the Civil Service Commission. The letter also indicated that any action under section 717 of the 1964 Civil Rights Act, 42 U.S.C. §2000e-16, must be commenced within 30 days of receipt of the letter. At that time, and until May of 1974, it was the uniform position of the Department of Justice that section 717 did not apply to claims such as those of petitioner, which arose prior to the effective date of the statute, and that there were accordingly no rights to be lost by failing to sue within 30 days.[1]

On the basis of this letter petitioner decided to file suit. Because petitioner had great difficulty locating an attorney who would represent him, he did not succeed in filing his complaint until May 7, 1973, 12 days after the deadline for filing an action under section 717.[2] Since the

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[1] On August 10, 1973, the government moved to dismiss this action in the District Court on the ground, *inter alia*, that petitioner had not commenced his action within the 30 days required under Section 717. On July 27 and September 24, 1973, the same United States Attorney filed memoranda in the same District Court, in *Henderson* v. *Defense Contract Administration Services*, 370 F. Supp. 180 (S.D.N.Y. 1973), arguing that section 717 did not apply to employees such as petitioner who were the victims of discrimination prior to March 24, 1972.

[2] Within a week of receiving the letter of March 23, petitioner presented himself and the letter to the clerk of the United States

deadline for filing an action under section 717 had by then passed, petitioner asserted federal jurisdiction under several other statutes, including the Mandamus Act, 28 U.S.C. § 1361, the Tucker Act, 28 U.S.C. § 1346, the 1866 Civil Rights Act, 42 U.S.C. § 1981, and the Administrative Procedure Act.

On September 27, 1973, the District Court for the Southern District of New York dismissed the action for lack of jurisdiction. On November 21, 1974, the Court of Appeals for the Second Circuit affirmed that dismissal. The Second Circuit concluded (1) that section 717 had, by implication, repealed *pro tanto* the Tucker Act, the Mandamus Act, the 1866 Civil Rights Act, the Administrative Procedure Act, and the other statutes which petitioner asserted created federal jurisdiction (2) that section 717 applied to discrimination occurring prior to its effective date, March 24, 1972, and that this implied repeal was accordingly retrospective and (3) that the exhaustion requirements for actions other than under section 717 were different and more stringent than the exhaustion requirements fixed by statute for an action under section 717, and that petitioner had failed to meet these special exhaustion requirements.

District Court for the Southern District of New York, where the *pro se* clerk advised him to retain a private attorney. Compare *Huston* v. *General Motors Corp.*, 477 F. 2d 1003 (8th Cir. 1973). Prior to obtaining the services of counsel, petitioner unsuccessfully sought assistance from three other attorneys, the New Jersey Civil Liberties Union, and the national office and a local chapter of the National Association for the Advancement of Colored People.

Reasons for Granting the Writ

1. The Decision of the Court Below That Section 717 Repealed, *Pro Tanto*, the 1866 Civil Rights Act, the Tucker Act, the Mandamus Act, and the Administrative Procedure Act, Is in Conflict With the Decisions of This Court, the Decisions of 5 Circuits, and the Express Intent of Congress

In the court below petitioner alleged that the District Court had jurisdiction over his claim under several statutes which create a variety of overlapping remedies. These statutes included the 1866 Civil Rights Act, 42 U.S.C. § 1981, the Mandamus Act, 28 U.S.C. § 1361, the Tucker Act, 28 U.S.C. § 1346, and the Administrative Procedure Act, 5 U.S.C. § 702. The Court of Appeals did not decide whether any of these statutes gave the District Court jurisdiction to remedy discrimination in federal employment. The Second Circuit concluded, instead, that even if these statutes had at one time authorized such remedies, they had all been repealed *pro tanto* by implication when Congress enacted section 717 as part of Title VII of the 1964 Civil Rights Act. Pp. 13a-15a. The court noted that actions under section 717 had to be filed within 30 days, and reasoned that it would "frustrate Congressional intent" to permit suits under statutes which contained no such limitation. P. 15a.

The decision of the Second Circuit is in clear conflict with the decisions of this Court in *Morton* v. *Mancari*, 41 L.Ed. 2d 290 (1974) and *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed. 2d 147 (1974). In *Morton* the appellant argued that section 717 had tacitly repealed earlier enacted statutory preferences in favor of Indian applicants for jobs at the Bureau of Indian Affairs. This Court unanimously rejected that contention:

> Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." . . . They

> and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. . . . The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.

41 L.Ed. 2d at 300-301. In *Alexander* the employer urged that an aggrieved employee could only invoke a single remedy in seeking to remedy racial discrimination. In ruling to the contrary this Court, expressly referring to the 1866 Civil Rights Act, explained,

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. . . . Moreover, the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed *to supplement, rather than supplant,* existing laws and institutions relating to employment discrimination.

39 L.Ed. 2d at 158. (Emphasis added). The Second Circuit, however, reasoned that Title VII was designed to supplant pre-existing remedies, and thus repealed them by implication. That holding is clearly inconsistent with this Court's decisions in *Morton* and *Alexander*. See also *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

The decision below is also in conflict with the decisions of five courts of appeals. Private employers have repeatedly advanced the same argument urged by the government in this case— that 42 U.S.C. § 1981 and other pre-existing statutes were repealed or "pre-empted" by Title VII. That contention has been uniformly rejected outside of the Second Circuit. *Long* v. *Ford Motor Co.*, 496 F.2d 500, 503-04 (6th Cir. 1970); *Brady* v. *Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972); *Young* v. *International Telephone & Telegraph*, 438 F.2d 757, 760-764 (3d Cir. 1971); *Boudreaux* v. *Baton Rouge Marine*, 437 F.2d 1011, 1016-17 (5th Cir. 1971); *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476, 484-85 (7th Cir. 1970). See also *Macklin* v. *Spector Freight Systems, Inc.*, 478 F. 2d 979, 993-996 (D.C. Cir. 1973); *Hickman* v. *Fincher*, 483 F. 2d 855, 857 (4th Cir. 1973). In each of these actions the private employer argued, as did the Second Circuit, that allowing suits under other statutes would allow employees to sue without meeting the procedural pre-requisites for an action under Title VII. In *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), the employee sued 46 days after receiving a right to sue letter from the E.E.O.C., and thus failed to meet the Title VII 30 day statute of limitations. The Fifth Circuit rejected the argument that Title VII precluded suits under section 1981.

> Since there is no language in Title VII that can remotely be construed as directly repealing § 1981, the only means of repeal through pre-emption would be by implication. Repeals by implication, however, are not favored . . . . Thus we conclude that the specific remedies fashioned by Congress in Title VII were not intended to pre-empt the general remedial language of § 1981. . . . The wide differences provided by the statute of limitations applicable to actions under the two acts are not irreconcilable . . . .

431 F.2d at 1100-1101.

In *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971), the employer claimed the plaintiff had not complained to E.E.O.C. within 90 days of the alleged discrimination as required for a Title VII action, and that allowing an action on any other basis would vitiate that requirement. The Court of Appeals concluded:

> [E]ven if appellant is unable to demonstrate his aggrieved status within the 90-day period for the purposes of this case it is clear that he has stated a claim for relief under 42 U.S.C. § 1983. . . . [T]he contention that the enactment of Title VII of the Civil Rights Act of 1964 pre-empted or repealed by implication whatever remedy for employment discrimination that previously existed under § 1981 . . . has [been] explicitly rejected . . . .

437 F.2d at 1016. In *Long* v. *Ford Motor Company*, 406 F.2d 500 (6th Cir. 1974) the plaintiff had not filed any complaint with E.E.O.C., a clear jurisdictional pre-requisite for a Title VII. The Sixth Circuit nonetheless upheld jurisdiction under section 1981, relying on this Court's decision in *Alexander* v. *Gardner-Denver Co., supra,* as compelling the conclusion that Title VII had not pre-empted section 1981. In *Drew* v. *Liberty Mutual Insurance Company,* 480 F.2d 69 (5th Cir. 1973), plaintiff sued for injunctive relief while her complaint to E.E.O.C. was still pending. Only the Commission was authorized to bring an action under Title VII to protect an employee during the pendency of such administrative proceedings. The Fifth Circuit upheld plaintiffs right to bring such an action under section 1981, rejecting the contention that that right had been pre-empted by Title VII. 480 F.2d at 74-76.

The decision below is also contrary to the clear intent of Congress. Congress has repeatedly rejected proposals

to make Title VII the exclusive remedy for claims of racial discrimination in employment. In 1964 Senator Tower proposed an amendment to the pending Civil Rights Act to make Title VII the exclusive remedy for discrimination in employment. The amendment was defeated on the floor of the Senate. 110 Cong. Rec. 13650-52. In 1972 Senator Hruska proposed an amendment which would have made Title VII the exclusive remedy for claims of employment discrimination. The amendment was opposed by the Department of Justice; the chief of the Civil Rights Division testified,

> [W]e are concerned that at this point in time there be no elimination of any of the remedies which have achieved some success in the effort to end employment discrimination. In the field of civil rights, the Congress has regularly insured that there be a variety of enforcement devices to insure that all available resources are brought to bear on problems of discrimination. . . . [I]t would, in our judgment, be unwise to diminish in any way the variety of enforcement means available to deal wih discrimination in employment.[3]

In opposing the Hruska Amendment, Senator Javits argued:

> There are other remedies, but those other remedies are not surplusage. Those other remedies are needed to implement the promise we make under the Constitution to prevent discrimination in employment. The laws of 1866, 1871, as well as the law of 1964 are to implement that promise . . . . Mr. President, the key to the proposition which we laid before the Sen-

[3] Hearings Before the Senate Committee on Labor and Public Welfare, 91st Cong. 1st Sess., 162-163 (1971).

> ate—incidentally, this has now been the law for the last 8 years—is that what this amendment would seek to do is cancel away much of that law. It seems to me that should not be the attitude of the Senate, in face of the fact, as I say, that employees are not fully protected by the exclusive remedy which is sought to be compelled by this amendment.[4]

A similar proposal was rejected by the House Labor Committee, which expressly approved the decisions in *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971) and *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), and expressed its belief that the remedies afforded by Title VII and section 1981 "augment each other and are not mutually exclusive".[5] If the Department of Justice now believes that Congress erred in rejecting the Tower and Hruska amendments, its remedy is to seek an amendment to Title VII from the Congress, not from the courts.

The importance of preserving non-Title VII remedies for federal employees is well illustrated by the history of litigation under Title VII. Because of the stringent jurisdictional requirements for a Title VII action, aggrieved minority employees—frequently under-educated and without the assistance of counsel—have often failed to meet the statutory prerequisites, and have resorted instead to suits under other federal statutes. See pp. 9-10, *supra;* compare *Love* v. *Pullman Co.*, 404 U.S. 522, 525-526 (1972). Even where an employee succeeds in bringing a Title VII action, he may also wish to assert jurisdiction under other statutes which may provide different and more ample

[4] Legislative History of the Equal Employment Opportunity Act of 1972, pp. 1512-1514.

[5] H.R. Rep. 92-238, U.S. Code Congressional and Administrative News, 92nd Cong., 1st Sess., 78-79 (1971).

remedies. See pp. 15-16, *infra.* The Solicitor General has correctly characterized these additional remedies available under statutes such as section 1981 as "of substantial importance."[6] Earlier this term the government urged this Court to reaffirm the existence and preserve the vitality of an employee's non-Title VII rights against a private employer.[7] An employee should not enjoy a lesser remedy because he works for the United States. Congress enacted section 717, not to restrict the remedies available to such workers, but "to accord Federal Employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. 92-238, p. 23 (1971).[8] A grant of certiorari is necessary in the instant case to enforce that congressional policy.

2. The Decision of the Court Below, Establishing for Actions Under the 1866 Civil Rights Act, etc., Exhaustion Requirements Different Than Those Established by Congress for Actions Under Section 717, Seriously Undermines the Statutory Scheme of Title VII

Petitioner filed his administrative complaint on July 15, 1971. After a delay of 617 days, the final agency decision was rendered on March 23, 1973. These administrative proceedings constituted sufficient exhaustion for purposes of a civil action under section 717, which authorizes such suits after final agency action or the passage of 180 days, which-

[6] Brief for the United States as Amicus Curiae, in *Johnson* v. *Railway Express Agency*, No. 73-1543, pp. 13-14.

[7] "Although Title VII was designed as a comprehensive solution to the problem of invidious employment discrimination, Congress intended individuals aggrieved by such discrimination to have available parallel or overlapping remedies; such individuals are not limited to seeking relief only under Title VII." *Id.*, p. 13.

[8] Section 717(d) provides that the procedures in civil actions against the federal agencies shall be the same as in cases against private employers. See 42 U.S.C. § 2000e-16(d).

ever occurs sooner. In order to sue under section 717, petitioner was not required to pursue an appeal to the Board of Appeals and Review of the Civil Service Commission. The court below, however, held that there was a different and more stringent exhaustion requirement for actions under the 1866 Civil Rights Act and other statutes enacted prior to 1972, and concluded that prior to commencing an action under these statutes petitioner was obligated to appeal to the Board of Appeals and Review.

The decision of the Second Circuit thus establishes two exhaustion standards for a federal employee aggrieved by discrimination. The exhaustion requirement for a section 717 action is the passage of 180 days since the commencement of administrative proceedings or the completion of agency action, whichever occurs first. See 42 U.S.C. § 2000e-16(c). The exhaustion requirement for an action under section 1981 or other statutes enacted before 1972 is the processing of a grievance all the way through the Board of Appeals and Review. See pp. 16a-18a. An aggrieved employee who has obtained final agency action or has waited 180 days thus faces a Hobson's choice—he can sue at once under section 717, but in so doing he loses all his rights under pre-1972 statutes, or he can preserve those rights but only by enduring administrative delays substantially longer than contemplated by Congress.

This rule poses the same type of problem as is raised by *Johnson* v. *Railway Express Agency*, No. 73-1543, argued December 11, 1974. The express exhaustion requirements of section 717 reflect an important congressional policy that aggrieved federal employees not be required to pursue administrative remedies that Congress regarded as either futile or unreasonably time consuming. That policy was adopted by the ninety-second Congress in the light of substantial evidence that open-ended exhaustion re-

quirements had led to endless and pointless delays. See p. 17, *infra*. The basis for that policy is well illustrated by the facts of this case. Both the regulations of the Civil Service Commission, 5 C.F.R. § 713.220, and section 717 by implication, required that petitioner's administrative complaint be completely processed by his agency within 180 days. In fact the agency took more than three times that long to reach a final decision. Similarly the record of the Board of Appeals and Review, in considering appeals of aggrieved employees, reveals the futility of pursuing such appeals. In the last three fiscal years the Board has reversed an agency decisions and entered findings of discrimination in only 37 of 1876 appeals, less than 2%.[9] A significant number of these reversals came in appeals by white employees who claimed they had been discriminated against by agency affirmative action programs.

There are, on the other hand, a number of legitimate reasons why an aggrieved employee would want to retain his rights under section 1981 and other pre-1972 enactments. The statute of limitations may be longer under section 1981 than under section 717.[10] Although compensatory and punitive damages may not be available under Title VII,[11] the pre-1972 statutes are not so limited. The government has generally maintained, except in this case, that section 717 does not apply to discrimination occurring before March 24, 1972. See p. 5, *supra*. An employee such as petitioner, aggrieved by an act of discrimination commencing before that date, may only have an

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[9] Board of Appeals and Review, Work Load Statistics, fiscal years 1972, 1973, 1974.

[10] Compare Memorandum of the Respondents in Opposition, No. 74-116, pp. 3-4.

[11] See e.g. *Loo* v. *Gerarge*, 374 F.Supp. 1338 (D. Hawaii 1974); *Howard* v. *Lockheed Georgia Co.*, 372 F.Supp. 854 (N.D. Ga. 1974).

adequate remedy under statutes other than section 717. Section 717(c) appears to authorize relief only against the agency itself; under section 1981 an employee might also be able to obtain relief against discriminating individuals in an appropriate case. The scope of judicial review may be broader if an action is brought under section 1981. See *Bowers* v. *Campbell*, 8 EPD ¶ 9752 (9th Cir. 1974). And, as is detailed *supra*, pp. 10-12, Congress in enacting section 717 intended to leave intact all such pre-existing statutory rights and remedies.

This problem is aggravated by the practices of the Civil Service Commission. At the completion of final agency action, as in this case, each agency, pursuant to forms suggested by the Commission, sends the employee a letter notifying him that he may now commence a private action in federal court or, if he prefers, appeal to the Board of Appeals and Review. Nothing in the letter states or implies that the employee will lose any rights whatever by declining to pursue that appeal.[12] Thousands of these letters have been sent out to employees who, like petitioner, relied on them and declined to pursue such an appeal.[13]

[12] The letter sent to petitioner on March 23, 1973, read in part:

"If this decision does not meet with your satisfaction, you may file an appeal, in writing, either in person or by mail, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415. The Board's decision is the final administrative appeal. This appeal must be filed within 15 days of receipt of this letter.

"If you choose to appeal to the Board of Appeals and Review, you retain the right to file a civil action in Federal district court within 30 calendar days after receipt of the Board's final decision on your appeal. You also have the right to file a civil action in Federal district court within 30 calendar days of receipt of this letter or 180 days after filing an appeal with the Board of Appeals and Review if no decision has been made."

[13] The argument that petitioner had not adequately exhausted his administrative remedies was not raised by the government in the District Court or in its brief in the Court of Appeals, but first arose in a suggestion by the government at oral argument. There was, as a result, nothing in the record before the Court of Appeals as to why petitioner had not pursued such an appeal. That decision was in fact made because such an appeal appeared futile, because of the long delays already endured, and because petitioner believed in light of the letter he received from the General Services Administration that failure to appeal would not entail any loss of rights.

The congressional judgment as to what constitutes excessive exhaustion requirements must be heeded by the courts in fashioning exhaustion rules under statutes such as 42 U.S.C. § 1981. This Court has long recognized that a complainant need not further pursue administrative remedies where previous exhaustion efforts have taken so long as to make further delay unreasonable, *Smith* v. *Illinois Bell Telephone Co.*, 270 U.S. 587 (1926),[14] or where there is no reasonable chance that the result of further administrative proceedings will be favorable to the grievant. *City Bank Farmers' Trust Co.* v. *Schnader*, 291 U.S. 24 (1934). In the case of federal employees aggrieved by discrimination on the basis of race, Congress has concluded that it would be unfair to require such employees to file an appeal with the Board of Appeals and Review in the Service Commission because "the record shows that the Board rarely reverses the agency decision." H. Rep. 92-238, p. 24. Similarly Congress has concluded that, because of the nature of these claims and the history of excessive delays in their processing, it would be unconscionable to require such employees who want to resort to the courts to spend more than 180 days exhausting their administrative remedies.[15] It would be inappropriate for the

[14] See also *Sunshine Publishing Co.* v. *Summerfield*, 184 F.Supp. 767 (D.D.C. 1960) (One and one half year delay); Note, 72 Yale L.J. 574 (1963).

[15] See Hearings Before a Subcommittee of the House Committee on Education & Labor, 91st Cong., 1st and 2nd Sess. 111-112, 118,

courts, in delineating exhaustion requirements for section 1981 and other statutes without express exhaustion standards, to require aggrieved employees to pursue appeals to the Board of Appeals and Review, a step which Congress concluded was futile, or to consume more than 180 days in administrative proceedings, a delay which Congress concluded was unfair. Compare *Walker* v. *Southern R.R. Co.*, 385 U.S. 196 (1966).

The decision below places in irreconcilable conflict two clear congressional policies—the policy in favor of permitting resort to the courts without unreasonably lengthy or futile exhaustion, and the policy of creating overlapping and complementary civil remedies. An employee who has waited 180 days or obtained final agency action must choose between prompt judicial action or retaining his non-Title VII remedies—in the Second Circuit, at least, he cannot have both. Here, as in *Johnson* v. *Railway Express Agency*, "[t]here is no basis in either Section 1981 or Title VII, or their respective legislative histories, for imposing such a Hobson's choice."[16] The choice is particularly difficult because an employee has only 30 days after final agency action to file a section 717 action and only 15 days to request an appeal to the Board of Appeals & Review. The court below requires an employee to gamble away his non-Title VII rights by not appealing by the 15th day in the hope that he will be able to find a lawyer and file suit by the 30th. If, like petitioner, he does not succeed in filing his Section 717 on time it is already too late to appeal and his non-Title VII rights are also lost. Such "a procedural trap for the unwary"

147-149, 157, 176-180, 238-240 (1969-70); Hearings Before a Subcommittee of the Senate Committee on Labor & Public Welfare, 92nd Cong., 1st Sess., 206, 212, 276 (1971).

[16] Brief of United States as Amicus Curiae, in No. 73-1543, p. 17.

should not be allowed to obstruct the enforcement of basic rights. *Crown Coat Front Co., Inc.* v. *United States*, 386 U.S. 503, 515 (1967).

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2026-LFM

CLARENCE BROWN,

Plaintiff,

—against—

GENERAL SERVICES ADMINISTRATION, *et al.*,

Defendants.

MACMAHON, *District Judge.*

This action is brought purportedly against a government agency and several of its officers and is, therefore, one against the United States itself. *Gnotta* v. *United States,* 415 F.2d 1271 (8th Cir. 1969), *cert. denied,* 397 U.S. 934 (1970). The government, however, has not consented to such a suit and the action is therefore barred by sovereign immunity. *Dalehite* v. *United States,* 346 U.S. 15 (1953). Moreover, there is nothing in either the Civil Rights Act of 1964, 28 U.S.C. §§ 1331, 1343, or the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., which waives immunity or confers subject matter jurisdiction.

Accordingly, this court lacks subject matter jurisdiction over this action, and defendant's motion to dismiss the complaint, pursuant to Rule 12(b), Fed.R.Civ.P., is granted.

So ordered.

Dated: New York, N. Y.
September 26, 1973

LLOYD F. MACMAHON
Lloyd F. MacMahon
United States District Judge

Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 935—September Term, 1973.

(Argued June 14, 1974 Decided November 21, 1974.)

Docket No. 73-2628

CLARENCE BROWN,

Plaintiff-Appellant,

v.

GENERAL SERVICES ADMINISTRATION, UNITED STATES OF AMERICA, TRANSPORTATION AND COMMUNICATIONS SERVICE, COMMUNICATIONS DIVISION, REGION 2, JOSEPH A. DALY, Regional Director, Transportation and Communications Service, ALBERT GALLO, Chief, Communications Division and FRANK A. LAPOLLA, Acting Chief, Communications Division, Transportation and Communications Service, Region 2,

Defendants-Appellees.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Appeal from judgment entered in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing a complaint which alleged racially discriminatory em-

ployment practices on the part of an agency and officials of the federal government.

Affirmed.

ERIC SCHNAPPER, New York, N.Y. (Jeff Greenup, Jack Greenberg, James M. Nabrit, III, Johnny J. Butler, Joseph P. Hudson and Greenup & Miller, New York, N.Y., on the brief), *for Plaintiff-Appellant.*

CHARLES FRANKLIN RICHTER, Asst. U.S. Atty., New York, N.Y. (Paul J. Curran, U.S. Atty., and Gerald A. Rosenberg, Asst. U.S. Atty., New York, N.Y., on the brief), *for Defendants-Appellees.*

TIMBERS, *Circuit Judge:*

This appeal from a judgment entered September 28, 1973 in the Southern District of New York, Lloyd F. MacMahon, *District Judge,* dismissing the complaint in an action brought against an agency and officials of the federal government to redress alleged racially discriminatory employment practices presents the questions (1) whether Section 717(c) of the Equal Employment Opportunity Act of 1972[1] applies retroactively to claims arising before its

1 Section 717(c) of the Equal Employment Opportunity Act of 1972 as codified in 42 U.S.C. §2000e-16(c) (Supp. II 1972), provides in pertinent part:

"Within thirty days of receipt of notice of final action taken by [an] . . . agency, or by the Civil Service Commission upon an appeal from a decision or order of such . . . agency . . . on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred

enactment; (2) whether the statute pre-empts any other federal jurisdictional basis for appellant's claim; and (3) whether in any event appellant has failed to exhaust administrative remedies. We hold that each of these questions must be answered in the affirmative. We affirm.

I. Facts

Appellant Clarence Brown, a black, has been employed by the General Services Administration (GSA) Regional Office No. 2 (New York City) since 1957. He has not been promoted since 1966. His current job classification is Communications Specialist, GS-7, Telecommunications Division, Automated Data Telecommunications Service.

In December 1970, Brown was referred for promotion to GS-9 by his supervisors along with two white employees, Ownbey and Trost. All three were rated "highly qualified". Trost was the only one promoted. Brown filed an administrative complaint of racial discrimination with the GSA Equal Employment Opportunity Office. The complaint was withdrawn, however, after Brown was told that further promotions would soon be available and that he had been denied promotion because of lack of the requisite "voice experience".

Brown claims that he thereafter acquired full "voice experience". In June 1971, another GS-9 promotional opportunity opened. Brown and Ownbey again were rated "highly qualified" for the opening. A third white employee also was available. Ownbey was chosen.

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and eighty days from the filing of the initial charge with the . . . agency . . . or with the Civil Service Commission on appeal from a decision or order of such . . . agency . . . until such time as final action may be taken by [an] . . . agency, . . . an employee . . . if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the . . . agency, . . . shall be the defendant."

On July 15, 1971, Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office, claiming racial discrimination in the denial of his promotion. An investigative report was prepared. After review, the GSA Regional Administrator determined that there was no evidence of racial discrimination and so informed Brown by letter dated October 19, 1972. This letter also informed Brown that he could request a hearing on his complaint within seven days; but that if he did not make such a request, the determination would become the final agency decision and he would then have the right to appeal the GSA's decision to the Board of Appeals and Review of the Civil Service Commission (CSC), or to file a civil action in the federal district court within 30 days.

Brown requested a hearing. It was held on December 13, 1972 before a complaints examiner of the CSC. Brown was represented by counsel. On February 9, 1973, the complaints examiner issued his findings and recommended decision. He found no evidence of discrimination and recommended that no action be taken on the basis of the complaint.

By letter dated March 23, 1973, received by Brown on March 26, the GSA Director of Civil Rights rendered the final agency decision that the evidence did not support the complaint of racial discrimination. The letter, pursuant to regulations, included a copy of the transcript of the hearing and of the findings and recommended decision of the complaints examiner. The letter also advised Brown of his options: (1) to file an appeal with the Board of Appeals and Review of the CSC within 15 days after receipt of the letter, in which case he could commence a civil action in the federal district court within 30 days after receipt of the Board's decision or 180 days after filing the appeal if no decision had been rendered; or (2) to commence a

civil action in the federal district court within 30 days after receipt of the letter.[2]

Brown did not file an appeal with the Board. Instead, he commenced the instant action in the district court on May 7, 1973—more than 30 days after receipt of the letter. His complaint named as defendants the GSA and Brown's superiors, Joseph A. Daly, Albert Gallo and Frank A. Lapolla.

Basically, Brown's complaint alleges that he has been denied promotions because of his race.[3] Apparently he seeks a promotion to Communications Assistant, GS-9, a supervisory position, and appropriate back pay, although some reference is made in his brief to damages based on discrimination.

The original complaint alleged jurisdiction under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970); Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16 (Supp. II 1972); 28 U.S.C. §1331 (1970); and the Declaratory Judgment Act, 28 U.S.C. §§2201-02 (1970). The complaint also sought to invoke jurisdiction to secure protection of and redress deprivation of rights secured by 42 U.S.C. §§2000e et seq. (1970) and 42 U.S.C. §1981 (1970). The complaint demanded "such relief as may be appropriate, including injunctive orders, damages, costs, attorney's fees and back pay."[4]

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2 The provisions for civil actions are set forth in Section 717(c) of the Equal Employment Opportunity Act, 42 U.S.C. §2000e-16(c) (Supp. II 1972). See note 1 *supra*.

3 The position of the GSA is that Brown is a somewhat uncooperative employee and therefore has not been promoted. The substantive dispute, however, is not before us on this appeal. Our decision is limited to the threshold jurisdictional questions presented.

4 Relief available under Title VII and the regulations promulgated thereunder would include retroactive promotion with back pay and attorney's fees. 42 U.S.C. §§2000e-16(d), 2000e-5(g) (Supp. II 1972); 42 U.S.C. §2000e-5(k) (1970); 5 C.F.R. §713.271(b) (1974).

On July 23, 1973, defendants moved to dismiss the complaint on the ground that the court lacked subject matter jurisdiction since Brown had not filed his complaint within 30 days as required by Section 717(c) of the Equal Employment Opportunity Act of 1972 and his action therefore was barred by sovereign immunity.

On September 18, 1973, Brown moved for leave to file an amended complaint. The proposed amended complaint sought to add the CSC and Selbmann, the complaints examiner, as defendants, the original complaint having stated that the CSC had been joined as a party defendant although it was not actually named. The amended complaint also alleged as additional bases of jurisdiction 28 U.S.C. §1343 (4) (1970) and the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970), and added an allegation that more than $10,000 was in controversy.[5]

In a memorandum opinion filed September 27, 1973, Judge MacMahon held that Brown's action was barred by sovereign immunity and that the district court therefore lacked subject matter jurisdiction. The judge also denied the motion for leave to amend on the ground that the original complaint had been dismissed and the proposed amended complaint did not change the situation.

The essential questions thus presented are whether Section 717(c) of the Equal Employment Opportunity Act of 1972 is to be applied retroactively to claims arising before but pending administratively at the time of its enactment; if so, whether that Act pre-empts any other avenue of judicial review; and whether in any event appellant has failed to exhaust administrative remedies.

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5 Although the original complaint had alleged jurisdiction under 28 U.S.C. §1331 (1970), no jurisdictional amount was alleged.

II. Legislative History and Statutory Provisions

We believe that a key to the resolution of these questions may be found in the legislative history and the statutory provisions that emerged.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex or national origin. 42 U.S.C. §§2000e-2 to -3 (1970), as amended (Supp. II 1972). As originally enacted in 1964, however, it did not apply to federal employees. 42 U.S.C. §2000e(b) (1970). Executive Orders[6] and agency regulations covered their complaints of employment discrimination.[7] In general, the agency itself conducted an investigation and hearing on such complaints. Although the hearing examiner might come from an outside agency, especially the CSC, the head of the employee's agency made the final agency determination. Appeal lay only to the Board of Appeals and Review of the CSC.[8]

No private right of action was provided for federal employees by Title VII until 1972 when Congress amended the Equal Employment Opportunity Act by adding Section 717(c). The legislative history of this section generally evinces a concern that job discrimination had not been eliminated in the federal government. It indicates the dissatisfaction of federal employees with the complaint procedures available. The committee reports show that Congress was not persuaded by testimony of agency officials that legislation was not needed because a private right

6 See Exec. Order No. 11478, as amended, Exec. Order 11590, 3 C.F.R. 207 (1974), 42 U.S.C. §2000e, at 10,297 (1970); Exec. Order 11246, as amended, Exec. Order 11375, 3 C.F.R. 169 (1974), 42 U.S.C. §2000e, at 10,294-97 (1970).

7 See 5 C.F.R. Pt. 713 (1971).

8 *Id.*; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, at 410, 423 (1972) (hereinafter cited as Legislative History).

of action already existed. They note that, even if such right was available, the federal employee faced defenses of sovereign immunity and failure to exhaust administrative remedies; and, even if such defenses were overcome, the relief available, such as back pay or immediate advancement, was in doubt.[9]

It was against this backdrop that Congress in 1972 provided a private right of action for federal employees who were not satisfied with the agency or CSC decisions. Under Section 717(c), an aggrieved employee may commence an action in a federal district court within 30 days after a final order by his agency on a complaint of discrimination based on race, color, religion, sex or national origin, *or* within 30 days after a final order of the CSC on an appeal from such an agency decision, *or* after the elapse of 180 days from the filing of the initial complaint with the agency or of the appeal with the CSC if no decision has been rendered. No appeal need be taken to the CSC. The employee may go directly to court after the agency decision. 42 U.S.C. §2000e-16(c) (Supp. II 1972), note 1 *supra*.

III. Retroactivity

Brown's administrative complaint was filed with the GSA in 1971. It was under agency consideration at the time of the enactment of Section 717(c) on March 24, 1972. The question of retroactivity thus presented is whether the section should be applied to claims of discrimination which arose before its effective date but were awaiting final administrative decision at that time.[10] Retroactivity in this

9 H. R. Rep. No. 92-238, 92d Cong., 1st Sess. 23-26 (1971), in Legislative History 61, 82-86; S. Rep. No. 92-415, 92d Cong., 1st Sess. 14-17 (1971), in Legislative History 410, 421-26.

10 Cf. *Petterway* v. *Veterans Administration Hospital*, 496 F.2d 223 (5 Cir. 1974) (Section 717(c) held not applicable to pre-Act claim of federal employment discrimination because complaint was no longer

context refers only to the claim; the district court complaint in the instant action was filed on May 7, 1973—well after the date of enactment.

All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they assume retroactive operation in their arguments here although they have argued otherwise elsewhere. Appellant argues that the section is not applicable to the instant action precisely because he did not file his complaint within the required 30 days and that other statutes provide a jurisdictional basis for his action.

The issue of retroactive application of this statute has resulted in a conflict between the circuits. The District of Columbia and Fourth Circuits have held that Section 717(c) applies retroactively to claims pending at the time of its enactment. *Womack* v. *Lynn,* —— F.2d —— (D.C. Cir. 1974) (No. 72-1827, filed October 1, 1974); *Koger* v. *Ball,* 497 F.2d 702 (4 Cir. 1974). The Sixth Circuit has held that it does not. *Place* v. *Weinberger,* 497 F.2d 412 (6 Cir. 1974). The district courts have gone both ways. Compare, e.g., *Ficklin* v. *Sabatini,* 378 F.Supp. 19 (E.D. Pa. 1974) (retroactive); *Henderson* v. *Defense Contract Administration Services,* 370 F.Supp. 180 (S.D.N.Y. 1973) (retroactive); *Walker* v. *Kleindienst,* 357 F.Supp. 749 (D.D.C. 1973) (retroactive) with *Moseley* v. *United States,* No. 72-380-S (S.D. Cal., filed January 23, 1973) (non-retroactive); *Hill-Vincent* v. *Richardson,* 359 F.Supp. 308 (N.D. Ill. 1973) (non-retroactive).

The conflict as to retroactivity has turned on whether Section 717(c) is to be viewed as providing a new substantive right for federal employees or whether it merely provides a new remedy for enforcing an existing right.

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pending in agency at time of enactment and because complaint was filed beyond 30 day period).

The pre-1972 right of a federal employee not to be discriminated against is said to be found in Congressional enactments, 5 U.S.C. §7151 (1970), and Executive Orders. Exec. Orders 11246, 11478, note 6 *supra.* Courts which have adopted the view that Section 717(c) provides a new remedy for enforcing an existing right have held the section retroactive on the grounds that it is remedial, *Henderson* v. *Defense Contract Administration Services, supra,* or that it is procedural. *Koger* v. *Ball, supra.*

Courts which have refused to give retroactive effect to the statute, aside from rejecting the view that Section 717(c) merely creates a new remedy for a pre-existing right, have held that Congress intended only certain portions of the Equal Employment Opportunity Act to be retroactive for the reason that in Section 14 of the Act, in 42 U.S.C. §2000e-5, at 1,257 (Supp. II 1972), there is a specific provision that amendments to one section of Title VII are to be given retroactive effect, and since there is no reference in Section 14 to Section 717(c), the latter should not be given retroactive effect. See, e.g., *Place* v. *Weinberger, supra.*

This latter view strikes us as being inconsistent with the underlying principle of *Bradley* v. *School Board of City of Richmond,* —— U.S. —— (1974), 42 U.S.L.W. 4703 (U.S. May 15, 1974). There the Supreme Court held that a statute[11] authorizing a federal court to award attorney's fees in school desegregation cases should have been applied by the Court of Appeals so as to result in the affirmance of the decision of the District Court which had awarded such fees on the basis of its general equity power, since the statute was enacted after the District Court's award but before

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11 Section 718 of the Emergency School Aid Act, Title VII of the Education Amendments of 1972, 20 U.S.C. §1617 (Supp. III 1973).

the Court of Appeals' decision. The rationale of the Supreme Court's decision was stated as follows:

> "We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." —— U.S. at ——, 42 U.S.L.W. at 4707.

We believe that this principle applies here. Neither the statute itself nor the legislative history gives any direction as to whether Section 717(c) should be applied to complaints pending within the agency at the time of its enactment. In light of *Bradley*, we cannot agree with the Sixth Circuit's holding in *Place* v. *Weinberger, supra*, that Congress by its silence as to all sections of the Act except one intended the other sections to have prospective application only. As the Supreme Court stated in *Bradley:*

> "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.
>
> Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. . . ." —— U.S. at ——, 42 U.S.L.W. at 4708.

While *Bradley* dealt with a court of appeals' review of a district court's decision, we believe that the underlying principle is applicable to a review by a district court of an agency decision. So far as the statutory language and the relevant legislative history are concerned, retroactive application of Section 717(c) would appear to be appropriate.

This does not end our analysis under *Bradley*. We must determine whether application of a change in law to pending claims "would result in manifest injustice". —— U.S. at ——, 42 U.S.L.W. at 4707. In each of the cases where Section 717(c) has been applied retroactively, it was done to *aid* a plaintiff in the prosecution of his complaint. See, e.g., *Koger* v. *Ball, supra*. In view of the policy of the federal government against discrimination in federal employment and its encouragement of efforts to eliminate such discrimination in the private and state and local government sectors, such retroactive application of the statute appears sound. If Section 717(c) is held applicable here, however, Brown's claim must fall since he admittedly has failed to comply with its 30 day filing requirement.

We hold that there is no "manifest injustice" in the retroactive application of the statute to Brown's complaint. Twice he was notified in letters from the GSA of the procedure for obtaining court review of the agency decision. Both letters gave notice of the 30 day filing requirement. His counsel have not suggested any excuse for the delay in filing the complaint—either in their briefs, or in oral argument, particularly in response to a direct question by the Court concerning such delay. Instead, his counsel argue that the statute does not apply because Brown has not complied with it.[12] In a sense, he is correct in that he cannot take advantage of the statute because he has not complied with its terms. This failure is fatal to Brown's claim, since we hold below that Congress intended Section 717(c) to be the exclusive judicial remedy for federal employee discrimination grievances.

IV. Pre-emption

Appellees argue that, whatever may be the merits of the alternative bases for jurisdiction asserted by appellant,

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12 It is interesting to note that both the original complaint and the proposed amended complaint invoked Section 717 as one basis of jurisdiction in the district court.

they are pre-empted by Section 717(c). Neither the Act itself nor its legislative history conclusively demonstrates that such pre-emption was intended. Congress enacted Section 717(c) to provide a private right of action for federal employees—a right it believed to have been previously non-existent or so difficult to enforce as to have been in effect non-existent. The most persuasive argument in favor of pre-emption is that the Act constitutes a waiver of sovereign immunity and as such must be strictly construed.

The doctrine of sovereign immunity forbids suits against the government without its consent. Sovereign immunity in the present context involves not only that of the United States but also that of its officers in performing their official functions. As the Eighth Circuit succinctly put it:

> "A suit against an officer of the United States is one against the United States itself 'if the decree would operate against' the sovereign, *Hawaii* v. *Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed. 2d 191 (1963); or if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration', *Land* v. *Dollar*, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947); or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act', *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949). . . ." *Gnotta* v. *United States*, 415 F.2d 1271, 1277 (8 Cir. 1969) (Blackmun, *J.*), *cert. denied*, 397 U.S. 934 (1970).

The court in *Gnotta* held that demands for promotion and back pay fall within the scope of this immunity as they necessarily involve expenditures from the Treasury and compel the exercise of administrative discretion in an official personnel area. 415 F.2d at 1277. This is precisely the relief demanded in the instant case.

Sovereign immunity would bar prosecution of this action absent an effective waiver. Congress can impose restrictions on its consent to be sued, *Battaglia* v. *United States*, 303 F.2d 683, 685 (2 Cir.), *cert. dismissed*, 371 U.S. 907 (1962), including limitations on the time within which suit must be commenced. *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1357 (5 Cir. 1972). The consent Congress has given for the instant type of action is set forth in Section 717(c). Such consent is conditioned on compliance with the 30 day filing requirement.

Statutes waiving sovereign immunity are to be strictly construed. But assuming, as appellant argues, that decisions of the Supreme Court illustrate a more liberal attitude with regard to waivers of sovereign immunity at least where a federal agency is concerned, see *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940); *Kiefer & Kiefer* v. *Reconstruction Finance Corp.*, 306 U.S. 381 (1939), we cannot ignore the explicit condition imposed by Congress on a suit such as the instant one. It would wholly frustrate Congressional intent to hold that a plaintiff could evade the 30 day filing requirement "by the simple expedient of putting a different label on [his] pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973).

The instant complaint was filed more than a year after passage of the 1972 Act. Brown had notice of its provisions. He has offered no excuse for failure to comply, nor has he addressed the issue of retroactivity. We find no injustice in requiring compliance with the 30 day filing requirement. On the contrary, to permit suit without compliance with the conditions imposed by Section 717(c) would effectively undermine the strong public policy that requires strict construction of a statute which waives sovereign immunity.[13]

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13 In view of our holding, we find it unnecessary to consider appellant's claims that jurisdiction can be founded on 28 U.S.C. §1361 (1970)

V. Failure to Exhaust Administrative Remedies

Finally, even if we were to hold in favor of Brown on the issues discussed above, his claim would fall for failure to exhaust administrative remedies under regulations in effect prior to the 1972 Act. Although he pursued these remedies to the extent of obtaining a final agency decision, he failed to appeal to the Board of Appeals and Review of the CSC. See 5 C.F.R. §§713.231 to .234 (1974), 34 Fed. Reg. 5371 (1969).

Assuming without deciding that exhaustion of federal administrative remedies may not be required in every case of alleged discriminatory federal employment practices, cf. *McKart* v. *United States,* 395 U.S. 185 (1969); but see *Penn* v. *Schlesinger,* 490 F.2d 700, 707-14 (5 Cir. 1973) (dissenting opinion), *rev'd en banc,* 497 F.2d 970 (5 Cir. 1974) (adopting panel dissent), there is nothing in the allegations of Brown's complaint which justifies the "premature interruption of the administrative process." *McKart* v. *United States, supra,* 395 U.S. at 193. The "notions of judicial efficiency" stressed by the Court in *McKart* are particularly applicable here:

> "A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195.

For aught that appears in the record before us, we cannot say that an appeal to the CSC might not have resulted in granting the relief sought by Brown. Since he did not exhaust his administrative remedies, however, we have been presented with troublesome jurisdictional questions

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(mandamus); the Administrative Procedure Act, 5 U.S.C. §§701-06 (1970); the Tucker Act, 28 U.S.C. §1346(a) and (b) (1970); and 42 U.S.C. §1981 (1970) and 28 U.S.C. §1343(4) (1970).

which must be resolved before the substantive issue of discrimination can even be considered. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 712.

Moreover, it cannot be said here that the administrative remedies available to Brown were inadequate or futile. Cf. *McKart* v. *United States, supra,* 395 U.S. at 200; *Eisen* v. *Eastman,* 421 F.2d 560, 569 (2 Cir. 1969), *cert. denied,* 400 U.S. 841 (1970). Administrative regulations in effect at the time Brown filed his complaint in the district court (and which remain in effect) provided for retroactive promotion with back pay if discrimination was found. 5 C.F.R. §713.271(b) (1974), 37 Fed. Reg. 22,717 (1972). This essentially is the relief sought in his federal court action. Nor does Brown claim that he had no notice of the appellate relief available (he received two letters so informing him), or that his attempts to seek administrative remedies were frustrated. See *Penn* v. *Schlesinger, supra,* 490 F.2d at 706.

Under the circumstances of this case, we hold that Brown inexcusably failed to exhaust available administrative remedies.

Conclusion

Clearly the federal courts have jurisdiction under Section 717(c) of the Equal Employment Opportunity Act of 1972 to review claims by federal employees of discriminatory employment practices. Brown's failure to comply with the statutory requirements with respect to appealing to the Board of Appeals and Review of the CSC, or by commencing a timely action in the district court, has presented the threshold jurisdictional issues to which this opinion is addressed. We hold that his failure to commence the instant action in the district court within 30 days of the final agency decision is fatal to his com-

plaint since Section 717(c) operates retroactively and preempts any other avenue of judicial review; and that he has failed to exhaust available administrative remedies. The entire process of administrative review by the CSC and of judicial review within the 30 day period for seeking such review makes no sense at all if an employee may simply ignore the statutory requirements.

Affirmed.